

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

O.H., an individual; C.D., an individual, Plaintiffs, v. SECRET HARBOR, a non-profit corporation, Defendant.	CASE NO. 2:23-cv-60 ORDER
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1. INTRODUCTION

This matter comes before the Court on the parties' motions: Plaintiffs' Motion to Compel (Dkt. No. 33), Defendant's Motion for Protective Order (Dkt. No. 59), Defendant's Motion for Relief from Deadline or Leave to File Response Out of Time (Dkt. No. 70), and Defendant's Motion for Relief from Scheduling Order (Dkt. No. 80).

The Court heard oral argument on the motions on January 17, 2024. Having considered the motions, the papers submitted in support of and in opposition to the motions, the remaining record, and the argument of counsel, the Court GRANTS, in part, Plaintiffs' Motion to Compel and Defendant's Motion for Protective Order. Dkt.

Nos. 33, 59. The Court also GRANTS Defendant's Motion for Relief from Deadline and Defendant's Motion for Relief from Scheduling Order. Dkt. Nos. 70 and 80.

2. DISCUSSION

2.1 The Court will consider Secret Harbor's untimely opposition brief.

Secret Harbor's opposition to Plaintiff's motion to compel was due on November 27, 2023, but it filed nothing on that day. *See* LCR 7(d)(3). On November 29, 2023, Plaintiffs filed a short reply brief informing the Court that Secret Harbor had failed to file papers opposing their motion. Dkt. No. 36 at 2. But later that same day, Secret Harbor responded to Plaintiffs' Motion to Compel. Dkt. No. 37. Secret Harbor asks the Court for relief from the opposition-brief deadline or leave to file a response "out of time." Dkt. No. 70.

At the hearing, Plaintiffs abandoned their objection to this motion. Still, whether a party has established good cause for leave to file a brief after time to do so has expired is left to the Court's discretion. *Pincay v. Andrews*, 389 F.3d 853, 859 (9th Cir. 2004); *see* Fed. R. Civ. P. 6(b)(1).

The Court cannot identify any prejudice to Plaintiffs, and Plaintiffs have waived their initial opposition to the late filing. The delay was minimal and had no real effect on the proceedings, as Plaintiffs have already filed a "supplemental reply" responding to Secret Harbor's late-filed brief. *See* Dkt. No. 68. There is no evidence that Defendant's conduct was in bad faith, as counsel claimed that the delay was caused by miscalculating the deadlines.

Accordingly, the Court finds Secret Harbor's neglect excusable and GRANTS its motion for relief from the deadline. Dkt. No. 70.

1 **2.2 Plaintiffs' Motion to Compel and Defendant's Motion for Protective**
2 **Order.**

3 Plaintiffs' Motion to Compel (Dkt. No. 33) and Defendant's Motion for
4 Protective Order (Dkt. No. 59) are flip sides of the same coin, addressing
5 overlapping issues about Plaintiffs' August 9, 2023, discovery requests. The Court
6 issues the rulings below:

7 **2.2.1 Common objections.**

8 Secret Harbor repeatedly objects to Plaintiffs' discovery requests on the basis
9 that it already produced the sought-after information to Plaintiffs' counsel during
10 discovery in the related state court cases that are pending in Skagit County. But
11 each lawsuit is an entire universe unto itself, and absent an agreement between the
12 parties, Secret Harbor has an independent obligation to produce documents and
13 information in response to discovery requests in *this* lawsuit. As a practical matter,
14 if Secret Harbor has already produced documents responsive to similar requests in
15 the state court proceedings (likely in electronic format), the burden of producing the
16 same documents in this lawsuit should be low.

17 Secret Harbor also objects to Plaintiffs' discovery requests as "grossly over
18 broad [and] unduly burdensome" because the temporal scope of Plaintiffs' requests
19 spans 45 years (i.e., 1979 to present) or longer where Plaintiffs propose no date
20 limitation at all. Secret Harbor would limit the request to the time that Plaintiffs
21 resided at Secret Harbor: 1985-1990.

22 Given the claims and defenses at issue, Plaintiffs' proposed date range is too
23 broad and Secret Harbor's is too narrow. At the hearing, Secret Harbor argued that

1 while the Skagit County Superior Court's rulings in the related cases were not
2 binding on this Court, it should consider them to be "persuasive." This position is
3 echoed in Secret Harbor's arguments that Skagit County Superior Court is a more
4 appropriate forum for this action if for no other reason than to insure consistent
5 rulings across the range of related cases on discovery matters.

6 Relevant to this discussion, the Skagit County Superior Court ruled in a
7 related case against Secret Harbor that "January 1, 1977 through December 31,
8 2013," was a reasonable scope for the plaintiffs' discovery requests. Dkt. No. 35-9 at
9 3; see Dkt. No. 35-8 at 2 (showing that the plaintiffs in the related case resided at
10 Secret Harbor from 1986 – 2003). The state court left the door open for the plaintiffs
11 in the related case to return to court to seek an expanded scope "[i]f, at a later date,
12 Plaintiffs have reason to believe the information and documents from outside of this
13 period may lead to the discovery of relevant information . . ." Dkt. No. 35-9 at 3.

14 Since the state court ruling, however, Secret Harbor has conducted more
15 searches for responsive records and offers the declaration of its CEO describing the
16 burdens posed by Plaintiffs' discovery requests on the organization's relatively
17 small staff, including the 75 hours spent merely conducting an initial review and
18 the fact that many documents in question are "faded typeface and/or handwritten,"
19 rendering electronic search tools ineffective. Dkt. No. 58 at 3. These burdens
20 warrant a narrower date range than what was approved in state court.

21 Accordingly, unless stated otherwise, the Court limits Plaintiffs' requests to
22 January 1, 1980, to December 31, 1995. Plaintiffs may move to expand the scope of
23 discovery, but only after conferring with Secret Harbor first, if there is reason to

1 believe other relevant and discoverable documents or information lie outside this
2 range.

3 **2.2.2 Request for Production 2.**

4 Plaintiffs requested “(1) all insurance policies under which any person
5 carrying on an insurance business may be liable to satisfy part or all of a judgment
6 which may be entered in the action or to indemnify or reimburse for payments made
7 to satisfy the judgment, including all applicable declaration pages, endorsements
8 and amendments; and (2) any documents affecting coverage (such as any documents
9 and correspondences relating to the denial of coverage, rescission of coverage,
10 extension of coverage, or reserving rights) from or on behalf of any person carrying
11 on an insurance business, to any defendant or covered person or entity, or such
12 person’s/entity’s representative.”

13 Under the plain language of Fed. R. Civ. P. 26(a)(1)(iv), Secret Harbor has a
14 duty to produce “any insurance agreement under which under which an insurance
15 business may be liable to satisfy all or part of a possible judgment in the action or to
16 indemnify or reimburse for payments made to satisfy the judgment.”

17 This is so “counsel for both sides ... [can] make the same realistic appraisal of
18 the case, so that settlement and litigation strategy are based on knowledge and not
19 speculation.” Fed. R. Civ. P. 26 Advisory Committee Note (1970 Amendments).

20 If it has not already done so, the Court ORDERS Secret Harbor to produce
21 copies of all insurance policies or agreements that may be used to satisfy part or all
22 of any judgment or to indemnify or reimburse for payments made to satisfy the
23 judgment. Documents should be produced in their entirety including all applicable

1 declaration pages, endorsements, and amendments. Secret Harbor must also produce
2 any documents constituting a denial of coverage, rescission of coverage, extension of
3 coverage, or a reservation of rights.

4 **2.2.3 Requests for Production 3, 4, 5, 6, 7(a), 7(b), 8, 9.¹**

5 Plaintiffs requested Secret Harbor's daily-log entries, therapist notes,
6 psychiatric reports, incident reports, quarterly reports, discharge summaries, and
7 progress reports for each resident that reference "sexual conduct" between
8 residents, residents and staff members, or any allegations that such conduct
9 occurred.

10 Secret Harbor objects to these requests on several bases. First, Secret Harbor
11 contends the documents are not subject to disclosure because of confidentiality, the
12 age of the residents, and HIPAA. But none of these arguments constitute a privilege
13 to discovery in federal court. "The HIPAA regulations permit discovery of protected
14 health information so long as a court order or agreement of the parties prohibits
15 disclosure of the information outside the litigation and requires the return of the
16 information once the proceedings are concluded." *A Helping Hand, LLC v. Baltimore*
17 *Cnty., Md.*, 295 F. Supp. 2d 585, 592 (D. Md. 2003); *see also BNSF Ry. Co. v.*
18 *Lafarge Sw., Inc.*, No. CIV 06-1076 MCA/LFG, 2008 WL 11322949, at *5 (D.N.M.
19 May 9, 2008) ("HIPAA regulations do not trump the rules of civil procedure with

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21 ¹ Plaintiffs' requests for production are misnumbered, as there are two different
22 Request for Production No. 7. Dkt. No. 35-13 at 13-14. Plaintiffs compound this
23 error to confusing effect by renumbering their requests in their motion. Dkt. No. 33
at 10-11. The Court's order refers to the requests as originally numbered, except
that it has added a parenthetical notation to differentiate between the duplicate
request (i.e., Request for Production 7(a) and 7(b)).

1 respect to discovery obligations or questions of relevance.”). Any document that
2 implicates sensitive healthcare or medical information is already shielded from
3 indiscriminate disclosure by the protective order already in place. *See* Dkt. No. 20.

4 Second, Secret Harbor argues that it cannot properly respond to these
5 requests because Plaintiffs have not defined “sexual abuse.” Dkt. No. 59 at 1, 10.
6 But this is a strawman argument, as the requests at issue seek documents related
7 to “sexual conduct.” Dkt. No. 35-13 at 12–14. Plaintiffs define *sexual conduct* within
8 their discovery request: “‘Sexual conduct’ means any act pertaining to or involving
9 sexual acts, grooming acts, or acts involving any touching or other conduct of a
10 sexual nature.” *Id.* at 6. The Court finds this definition sufficiently specific, and it
11 bears repeating that the language of discovery requests “should not be read or
12 interpreted in an artificially restrictive or hyper-technical manner to avoid
13 disclosure of information fairly covered by the discovery request.” Fed. R. Civ. P. 37,
14 Advisory Committee Note (1993 Amendments).

15 Defendant should use the definition Plaintiffs provided for “sexual conduct”
16 and common sense to respond to each of these discovery requests. *Becker v.*
17 *Kikiktagruk Inupiat Corp.*, No. 3:09-CV-00015-TMB, 2009 WL 10705060, at *2 (D.
18 Alaska Oct. 20, 2009) (“Recipients of discovery requests must exercise common
19 sense and accord reasonable definitions to terms and phrases used in
20 interrogatories, requests for production, and requests for admissions.”).

21 Third, Defendants suggest that Plaintiffs requests should be limited to
22 incident reports or CPS reports when it comes to non-party residents. But what if
23 Secret Harbor’s staff failed to report incidents involving sexual conduct? There

1 would be no such reports. In this way, the daily log entries, therapist notes, and
2 other documents requested by Plaintiffs become important sources of information
3 potentially evidencing abuse. These records are plainly relevant and discoverable.

4 The Court GRANTS, in part, Plaintiffs' motion to compel requests for
5 production 3, 4, 5, 6, 7(a), 7(b), 8, and 9 with the time limitations described above in
6 Section 2.2.1.

7 **2.2.4 Request for Production 10.**

8 Plaintiffs request documents relating to the declaratory judgment action filed
9 by Markel Insurance Company against Secret Harbor. Secret Harbor contends the
10 documents sought are available to Plaintiffs via the online court docket. Rule 26
11 provides that the Court must limit the extent of discovery if it determines that the
12 material sought "can be obtained from some other source that is more convenient,
13 less burdensome, or less expensive." Rule 34, however, commands Secret Harbor to
14 produce any such documents in its "possession, custody, or control." Fed. R. Civ. P.
15 34(a)(1). Accordingly, Secret Harbor must produce any of the requested materials
16 that are in its possession, custody, or control. If Secret Harbor does not possess the
17 documents, Plaintiffs must obtain them elsewhere.

18 The Court GRANTS, in part, Plaintiff's motion to compel Request for
19 Production No. 10.

20 **2.2.5 Request for Production 12.**

21 Plaintiffs request documents relating to investigations of Secret Harbor staff
22 or residents. Secret Harbor contends that this request appears aimed at the State of
23 Washington and that Secret Harbor does not collect or maintain such data.

1 Although it may be true that the State has more documents related to these
2 investigations, Secret Harbor must produce the documents that it has in its
3 possession. *See* Fed. R. Civ. P. 34(a)(1).

4 Secret Harbor also argues that this request is overbroad, and the Court
5 agrees. Plaintiffs request “any and all documents relating to *any* investigation of
6 Secret Harbor staff or residents,” which implicates any number of irrelevant
7 subjects. Dkt. No. 35-15 at 27 (emphasis added). The Court limits this request to
8 investigation documents concerning alleged or suspected “sexual conduct,” alcohol
9 and drug use, and physical abuse. Fed. R. Civ. P. 26(b)(2)(C).

10 The Court GRANTS, in part, Plaintiff’s motion to compel Request for
11 Production No. 12, with the date limitations described above in Section 2.2.1.

12 **2.2.6 Request for Production 13.**

13 Plaintiffs request documents relating to (1) childcare licensing, (2) childcare
14 services, (3) childcare home assessments, (4) financial assistance and/or
15 reimbursement funds for childcare services, and/or (5) criminal arrests, criminal
16 convictions, and/or supervised probation resulting from criminal convictions of
17 employees.

18 The Court GRANTS, in part, Plaintiff’s motion to compel Request for
19 Production No. 13 with the date limitations described above in Section 2.2.1.

20 **2.2.7 Request for Production 14.**

21 Plaintiffs request documents relating to internal reviews related to reports of
22 child abuse. The Court GRANTS, in part, Plaintiffs’ motion to compel Request for
23

1 Production No. 14 with the date limitations described above in Section 2.2.1. Secret
2 Harbor should use its “reason and common sense” and “attribute ordinary
3 definitions to terms and phrases,” as it undertakes its search for responsive
4 documents. *See Thomas v. Cate*, 715 F. Supp. 2d 1012, 1030 (E.D. Cal. 2010).

5 **2.2.8 Request for Production 17 and 18.**

6 Plaintiffs request the personnel files for specific employees and documents
7 regarding complaints, substance abuse/rehab treatment participation, criminal
8 charges, or criminal convictions for each of the employees named.

9 According to Secret Harbor, some of these documents may have been
10 previously purged, and at least some of these individuals are State of Washington
11 agents or employees.

12 Personnel files contain a broad range of information, some of which is
13 sensitive in nature, such as personal or family healthcare information, or irrelevant
14 in this lawsuit, such as retirement benefit information. As a result, the Court limits
15 Plaintiffs’ document request to (1) discipline or counseling records, (2) warnings, (3)
16 performance evaluations, (4) performance-related communication, (5) separation of
17 employment, (6) training records, (7) dates of employment, (8) resumes, (9)
18 applications, (10) background checks, (11) reference checks, (12) complaints, (13)
19 discipline records, and (14) investigations where the employee is the subject of the
20 investigation for each of the listed individuals.

21 Secret Harbor must also produce documents in its possession for each of the
22 listed individuals regarding substance abuse/rehab treatment participation,
23 criminal charges, or criminal convictions.

1 The Court GRANTS in part Plaintiffs' motion to compel Request for
2 Production Nos. 17 and 18 with the date limitations described above in Section
3 2.2.1.

4 **2.2.9 Interrogatory Number 1.**

5 Plaintiffs seek the identity of and factual basis for each affirmative defense
6 that Secret Harbor asserts. Although discovery has not been completed, this
7 interrogatory is not premature. If Secret Harbor is not able to fully answer this
8 interrogatory, it must timely supplement its response under Fed. R. Civ. P. 26(e).
9 The Court ORDERS Secret Harbor to respond to this interrogatory to the best of its
10 ability and to timely supplement this response as new information becomes
11 available.

12 **2.2.10 Interrogatory Numbers 4, 5, and 6.**

13 In Interrogatory Number 4, Plaintiffs request the names, last known
14 addresses, last known telephone numbers, and dates of employment for all
15 employees hired by Secret Harbor from 1979 to the present. The Court ORDERS
16 Secret Harbor to respond to this interrogatory within the date limitations described
17 in Section 2.2.1.

18 In Interrogatory Number 5, Plaintiffs ask for the identity of all employees
19 who were terminated from employment, or who resigned in lieu of termination or
20 following an investigation, and the basis for the termination, resignation in lieu of
21 termination, or investigation. In Interrogatory Number 6, Plaintiffs ask Secret
22 Harbor to identify each of the employees who were alleged to be engaging in sexual
23 acts with a Secret Harbor Resident.

1 The Court ORDERS Secret Harbor to respond to Interrogatories 5 and 6 with
2 all information known about the individuals identified in Interrogatory Number 4.
3 Secret Harbor should use its “reason and common sense” and “attribute ordinary
4 definitions to terms and phrases,” as it searches for responsive information. *See*
5 *Thomas*, 715 F. Supp. 2d at 1030 (internal citation omitted). Secret Harbor may also
6 respond to these interrogatories by producing business records “specifying the
7 records that must be reviewed, in sufficient detail to enable the interrogating party
8 to locate and identify them as readily as the responding party could[.]” Fed. R. Civ.
9 P. 33(d)(1).

10 **2.2.11 Interrogatory Numbers 8, 9, and 10.**

11 The Court GRANTS, in part, Plaintiffs’ motion to compel responses to
12 Interrogatory Nos. 8, 9, and 10 with the date limitations described above in Section
13 2.2.1. Secret Harbor may also respond to these interrogatories by producing
14 business records “specifying the records that must be reviewed, in sufficient detail
15 to enable the interrogating party to locate and identify them as readily as the
16 responding party could[.]” Fed. R. Civ. P. 33(d)(1).

17 **2.3 Inspection and Production.**

18 The Court DENIES Plaintiffs’ request to inspect Secret Harbor’s records in
19 its offices to identify documents responsive to Plaintiffs’ discovery request. The
20 Court directs Secret Harbor to fully comply with this Order within 45 days.
21 Documents may be produced on a rolling basis, but the final production must be
22 made no later than 45 days from the date of this Order.
23

1 **2.4 Defendant's Motion for Relief from Scheduling Order (Dkt. No. 80).**

2 Secret Harbor filed this motion for relief from scheduling order deadlines and
3 a continuance of the trial date. Dkt. No. 80. Plaintiffs did not contest this motion at
4 the hearing. Both parties represented that another 90 days would be sufficient for
5 them to prepare the case for trial.

6 The Court GRANTS Defendant's motion. The Court extends all deadlines in
7 the June 26, 2023, Scheduling Order by 90 days. *See* Dkt. No. 17. The parties are
8 directed to coordinate with Grant Cogswell, the Courtroom Deputy, to schedule a
9 trial for fall 2024 beginning on or after September 16, 2024.

10 The Court reminds both parties that cases have a beginning and must have
11 an end, and that further continuances will not be granted absent extraordinary
12 circumstances.

13 **3. CONCLUSION**

14 The Court GRANTS, in part, Plaintiffs' Motion to Compel and Defendant's
15 Motion for Protective Order. Dkt. Nos. 33, 59. Secret Harbor is ORDERED to
16 complete a production of documents within 45 days of this Order.

17 The Court GRANTS Defendant's Motion for Relief from Deadline and
18 Defendant's Motion for Relief from Scheduling Order. Dkt. Nos. 70 and 80.

19
20 Dated this 26th day of January, 2024.

21 

22 Jamal N. Whitehead
23 United States District Judge